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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

11 TRAVELERS CASUALTY AND
12 SURETY COMPANY OF AMERICA,
a Connecticut corporation,

13 Plaintiff,

14 | v.

15 JOKAKE CONSTRUCTION
SERVICES, INC., an Arizona
16 corporation; and DOES 1 through 100

17 Defendants.

Case No. 2:23-cv-06301-HDV-AGR

**TRAVELERS CASUALTY AND
SURETY COMPANY OF
AMERICA'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF APPLICATION FOR
RIGHT TO ATTACH ORDER AND
ORDER FOR ISSUANCE OF WRIT
OF ATTACHMENT**

(Filed Concurrently Herewith: Notice of Application and Hearing; Application for Right to Attach Order; Declaration of Marc Brown; and Declaration of Steven Padula)

Hearing

Date: 12/14/2023
Time: 10:00 a.m.
Crtrm: 5B

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1 Plaintiff Travelers Casualty and Surety Company of America (“Travelers”)
2 respectfully submits the following Memorandum of Points and Authorities in
3 support of its application for a Right to Attach Order and Order for Issuance of Writ
4 of Attachment against Defendant Jokake Construction Services, Inc. (“Jokake” or
5 “Indemnitor”).

6 **I. INTRODUCTION**

7 By this Application, Travelers respectfully requests that this Court issue a
8 Right to Attach Order and Order for Writ of Attachment, in the amount of
9 \$25,000,000.00 to cover the current and potential losses under the performance and
10 payment bonds Travelers issued for Jokake on a private works construction project.

11 By way of a General Agreement of Indemnity, Jokake agreed to, among
12 other things, (1) reimburse Travelers for its losses from having issued the bonds and
13 (2) post collateral upon Travelers’ demand to cover any actual or potential loss. To
14 date, Travelers has actual losses of \$7,240,057.00 and anticipated losses in excess
15 of \$31,000,000.00 on the project.

16 Despite written demands, Jokake has failed to post collateral and/or
17 reimburse Travelers its existing and potential losses in material breach of the
18 General Agreement of Indemnity. Now, Travelers fears that Jokake will abscond
19 with and transfer assets to avoid its obligations under the General Agreement of
20 Indemnity.

21 As such, Travelers seeks a writ of attachment against Jokake to attach any
22 and all assets in the amount of \$25,000,000.00, which is the total sum of the
23 collateral demanded but unposted to date.

24 **II. STATEMENT OF FACTS**

25 **A. Indemnity Agreement and Bond**

26 On or about October 3, 2016, Jokake executed a General Agreement of
27 Indemnity (“GAI”) in favor of Travelers. (See Declaration of Marc Brown (“Brown
28 Decl.”) ¶ 7, Ex. A) Under the terms of the GAI, Jokake must indemnify and hold

1 harmless Travelers from any and all loss and expense incurred in connection with
2 Travelers' issuance of any bond on behalf of Jokake. The GAI states, in pertinent
3 part:

4 **3. Indemnification and Hold Harmless:** Indemnitors
5 shall exonerate, indemnify and save Company harmless
6 from and against all Loss. An itemized, sworn statement
7 by an employee of Company, or other evidence of
payment, shall be *prima facie* evidence of the propriety,
amount and existence of Indemnitors' liability. Amounts
due to Company shall be payable upon demand.

8 **5. Collateral Security:** Indemnitors agree to deposit
9 with Company, upon demand, an amount as determined
10 by Company sufficient to discharge any Loss or
11 anticipated Loss. Indemnitors further agree to deposit
12 with Company, upon demand, an amount equal to the
13 value of any assets or Contract funds improperly diverted
14 by any Indemnitor. Sums deposited with Company
15 pursuant to this paragraph may be used by Company to
pay such claim or be held by Company as collateral
security against any Loss or unpaid premium on any
Bond. Company shall have no duty to invest, or provide
interest on, the deposit. Indemnitors agree that Company
would suffer irreparable damage and would not have an
adequate remedy at law if Indemnitors fail to comply
with the provisions of this paragraph.

16 **6. Remedies:** In the event of a Default [...] Company
17 shall have the right to [...] (c) assert or prosecute any
18 right or claim in the name of any Indemnitor and to settle
19 any such right or claim as Company sees fit; (d) execute
20 in the name of any Indemnitor, any instruments deemed
21 necessary or desirable by Company to: (i) provide
22 Company with title to assets, (ii) take immediate
23 possession of Contracts funds whether earned or
24 unearned, (iii) collect such sums as may be due
25 Indemnitors and to endorse in the name of Indemnitors
26 and (iv) collect on any negotiable instruments [...] (f) be
subrogated to all the rights, remedies, properties, funds,
securities and receivables relating to Indemnitors'
Contracts or contracts and have the right to offset losses
on any Contract or Bond against proceeds, funds, or
property due from another Contract, bond or contract.
Further, in the event of Default and upon demand
Indemnitors shall direct that all payments, monies, and
properties that are due or may become due on any
Contract or contract be made payable to, and/or sent
directly to, Company, [...]

27 **9. Trust Fund:** All payments due or received for or on
28 account of any Contract, whether or not in the possession

1 of any Indemnitor, shall be held in trust as trust funds by
2 Indemnitors for the benefit and payment of all obligations
3 for which Company as beneficiary may be liable under
4 any Bond. Company may open a trust account or accounts
5 with a bank for the deposit of the trust funds. Upon
6 demand, Indemnitors shall deposit therein all trust funds
7 received. Withdrawals from such trust accounts shall
8 require the express consent of Company.

9
10 **10. Books, Records and Credit:** Indemnitors shall
11 furnish upon demand, and Company shall have the right
12 of free access to, at reasonable times, the records of
13 Indemnitors including, but not limited to, books, papers,
14 documents, contracts, reports, financial information,
15 accounts and electronically stored information, for the
16 purpose of examining and copying them. Indemnitors
17 expressly authority Company to access their credit
18 records, including, but not limited to, account numbers
19 and/or account balances from financial institutions. To the
20 extent required by law, Indemnitors, upon request, shall
21 be informed whether or not a consumer report has been
22 requested by Company, and if so, of the name and address
23 of the consumer reporting agency furnishing the report.

24 In addition, the GAI provided the following defined terms:

25 **Default** – Any of the following shall constitute a Default:
26 (a) a declaration of Contract default by any Obligee; (b)
27 actual breach of abandonment of any Contract; (c) breach
28 of any provision of this Agreement; (d) failure to make
payment of a properly due and owing bill in connection
with any Contract; (e) Company's good faith
establishment of a reserve; (f) improper diversion of
Contract funds or any Indemnitor's Assets to the
detiment of Contract obligations; (g) any Indemnitor's
becoming the subject of any proceeding or agreement of
bankruptcy, receivership, insolvency, or creditor
assignment, or actually becoming insolvent; (h) any
Indemnitor's dying, becoming legally incompetent, being
imprisoned, being convicted or a felony, or disappearing
and being unable to be located; (i) any representation
furnished to the Company by or on behalf of any
Indemnitor proving to have been materially false or
misleading when made; and/or (j) any change in control
or existence of any Indemnitor. Change in control means
the addition or departure of any person or entity having a
ten percent (10%) or greater ownership interest in any
Indemnitor.

29 **Loss** – All loss and expense of any kind or nature,
30 including attorneys' and other professional fees, which
31 Company incurs in connection with any Bond or this
32 Agreement, including but not limited to all loss and
33 expense incurred by reason of Company's: (a) making any
34 investigation in connection with any Bond; (b)

prosecuting or defending any action in connection with any Bond; (c) obtaining the release of any Bond; (d) recovering or attempting to recover Property in connection with any Bond or this Agreement; (e) enforcing by litigation or otherwise any of the provisions of this Agreement; and (f) all interest accruing thereon at the maximum legal rate.

On or around April 18, 2017, Jokake and Pasadena Oaks Life Properties, LLC (“Owner” or “Obligee”) entered into a written construction agreement (“Agreement”) in connection with the work of improvement known as the Las Encinas Psychiatric Hospital in Pasadena, California (“Project”). (Brown Decl., ¶ 10)

In connection with its work on the Project, Jokake requested that Travelers issue payment and performance bonds for the Project. (Brown Decl., ¶ 11) In reliance upon the terms of the GAI, on or about June 6, 2017, Travelers issued a performance bond and payment bond, bond number 106738868, in the respective amounts of \$33,822,581.00 (the “Bonds”). (Brown Decl., ¶ 12, Ex. B)

B. Jokake’s Termination and Claims on the Bonds

On or about March 14, 2022, Owner declared a default, terminated Jokake from the Project and filed a claim on the performance bond. (Brown Decl., ¶ 13) Pursuant to Travelers’ obligations under the performance bond, Travelers commenced its investigation of Owner’s claim. (Brown Decl., ¶ 14)

In addition to Owner’s claim on the performance bond, Travelers received numerous claims on the payment bond by various subcontractors of Jokake who performed work on the Project but claimed to be unpaid by Jokake. (Brown Decl., ¶ 14) Travelers immediately began investigating and resolving the payment bond claims. (*Id.*)

C. First Collateral Demand

On or about July 7, 2022, pursuant to the terms of the GAI, Travelers demanded that Jokake (a) indemnify Travelers in the then-incurred amount of \$224,531.22 and (b) post collateral in the amount of \$11,480,928.21 to cover

1 anticipated future losses on the Bonds with a reservation of rights to increase the
2 demand as additional facts become known (“First Collateral Demand Letter”).
3 (Brown Decl., ¶ 15, Ex. C)

4 In response to the First Collateral Demand Letter, Jokake paid Travelers the
5 indemnity amount of \$224,531.22, but failed to post any collateral for future
6 anticipated losses. (Brown Decl., ¶ 16) Jokake’s failure to collateralize Travelers
7 was a breach of the GAI.

8 **D. Takeover and Completion Agreements**

9 On November 1, 2022, Travelers and Owner entered into a written agreement
10 entitled “Takeover Agreement” wherein Travelers agreed to complete the
11 remaining work on the Project in exchange for payment under the Takeover
12 Agreement with a full reservation of rights. (Brown Decl., ¶ 17) Travelers
13 thereafter retained a completion contractor to perform the remaining work on the
14 Project and entered into a Completion Agreement for same (“Completion
15 Agreement”). (Brown Decl., ¶ 18)

16 **E. Second Collateral Demand**

17 On or about January 9, 2023, pursuant to the GAI, Travelers sent a second
18 collateral demand letter to Jokake (“Second Collateral Demand”) demanding
19 indemnity in the amount of \$1,092,217.13 for additional paid-to-date investigative
20 expenses, attorneys and other professional fees, payment bond claims, and
21 performance bond claims incurred by Travelers subsequent to the First Collateral
22 Demand Letter. (Brown Decl., ¶ 19, Ex. D) The Second Collateral Demand Letter
23 further demanded that Jokake post collateral (then in the amount of
24 \$19,864,316.80) to cover anticipated losses on the Bonds. (*Id.*)

25 To date, Jokake has failed and continues to fail to comply with all of
26 Travelers’ demands as set forth in the First Collateral Demand Letter and Second
27 Collateral Demand Letter and has not posted collateral in any amount. (Brown
28

1 Decl., ¶ 20). Jokake's failure to indemnify and collateralize Travelers is a breach of
2 the GAI.

3 **F. Status of Project Completion**

4 Since entering into the Completion Agreement, Travelers' completion
5 contractor has discovered both design errors and defects in the prior construction
6 work performed by Jokake and its subcontractors. (Brown Decl., ¶ 22; Declaration
7 of Steven Padula ("Padula Decl."), ¶ 16) Travelers has engaged experts to review
8 specific areas of the Project, including, but not limited to the HVAC ductwork, the
9 roofing system and the building envelope façade. (Padula Decl. ¶ 16) Based on the
10 reports provided by those experts, Abbott and Travelers' consultant, Sage
11 Associates, estimate repair costs for those areas in excess of \$1,191,000.00,
12 \$1,750,000.00 and \$4,700,000.00, respectively. (Padula Decl. ¶¶ 17-19, Exs. G, H,
13 I) To date, Travelers' estimates that it will cost roughly \$29,350,356.93 to perform
14 the remaining scope of work left on the Project, correct/repair defective or
15 nonconforming work, and pay construction management fees. (Brown Decl., ¶ 23;
16 Padula Decl., ¶¶ 11; 12, Ex. F; ¶ 13) Travelers asserts and maintains that the
17 estimates provided in support of this Application and attached to the Declaration of
18 Mr. Padula are or may be subject to the work product privilege. Travelers'
19 provision of these estimates in no way limits or waives Travelers' right to assert the
20 privilege at a later date in this action or any other proceeding, which right is
21 expressly reserved herein.

22 The estimate is preliminary and may increase with the discovery of new
23 defects and as design plans are implemented to correct the defective work. (Brown
24 Decl., ¶ 23; Padula Decl., ¶ 14)

25 **G. Travelers' Actual and Anticipated Losses**

26 To date, Travelers has incurred actual losses in the amount of \$7,240,057.00
27 on the Bonds. (Brown Decl., ¶ 24). These incurred losses consists of costs and
28 expenses for (1) investigating the claims on the Bonds; (2) payments to various

1 payment bond claimants; (3) defending Travelers in subcontractor lawsuits filed in
2 connection with the Project; (4) retaining outside counsel and consultants to assist
3 with investigation and completion of the Project and defense of claims; (5)
4 payments to Abbott for its work to date in completing the Project; and (6) enforcing
5 Travelers rights under the GAI in the instant action. (Brown Decl., ¶ 24)

6 In addition to the above incurred losses, Travelers has significant anticipated,
7 unliquidated losses. Travelers anticipates losses totaling \$29,350,356.93 on the
8 performance bond for completion of the Project, and believes this number is likely
9 to grow as the completion of the Project moves forward. (Brown Decl., ¶ 23;
10 Padula Decl., ¶ 14)

11 Travelers anticipates total losses on the payment bond of \$3,200,000.00 for
12 claims made by project subcontractors. (Brown Decl., ¶ 25).

13 Additionally, Travelers anticipates incurring losses in the amount of
14 \$2,999,000.00 for counsel and consultant expenses in handling the various bond
15 claims and overseeing the completion of the Project. (Brown Decl., ¶¶ 26, 30).

16 Finally, Travelers anticipates recovering some amounts from the Project
17 Owner and subcontractors, the exact amount of which is unknown at this time.
18 (Brown Decl., ¶ 27)

19 In sum, Travelers anticipates total losses in an amount in excess of
20 \$31,000,000.00 in connection with the bonds issued for Jokake. (Brown Decl., ¶
21 27). Notwithstanding this total anticipated loss figure, and in part to account for
22 potential future recoveries, Travelers' seeks to obtain a Writ of Attachment in the
23 lesser amount of \$25,000,000.00 for purposes of present day collateral security.
24 (Brown Decl., ¶ 27). The approximate \$6,000,000.00 credit for potential future
25 recoveries is a good faith estimate only. (*Id.*) Travelers does not admit, waive or
26 limit potential future recoveries to a specified dollar amount, which will or may be
27 decided in the future by a trier of fact according to the evidence presented by the
28 affected parties. (*Id.*)

1 Travelers seeks the instant relief to secure its rights under the GAI and to
2 attach Jokake's assets to ensure adequate relief when Travelers ultimately prevails
3 at trial in this action.

4 **III. FEDERAL LAW AUTHORIZES THE USE OF PROVISIONAL**
5 **REMEDIES THAT ARE PROVIDED FOR BY THE LAW OF THE**
6 **STATE IN WHICH THE DISTRICT COURT IS LOCATED.**

7 Federal law expressly authorizes the use of any provisional remedy that is
8 available to a party under the laws of the state in which the District Court is located.

9 Rule 64 of the Federal Rules of Civil Procedure provides:

10 (a) At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

11 (b) **The remedies available under this rule include the following [...] attachment [...] and other corresponding or equivalent remedies** (Emphasis added.)

12 Accordingly, federal courts generally must apply the provisional remedy law
13 of the state wherein they are situated. (*Granny Goose Foods, Inc. v Brotherhood of*
14 *Teamsters and Auto Truck Drivers Local No. 70*, (1974) 415 U.S. 423, 436-437;
15 *Reebok Int'l Ltd. v. Marnatech Enterprises, Inc.*, 970 F.2d 552 (9th Cir. 1992))
16 Thus, the provisional remedies available under California law are applicable in this
17 action.

18 Under California law, Travelers may apply for a Right to Attach Order for
19 Issuance of a Writ of Attachment. CCP §484.010 provides the following:

20 Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right
21 to attach order and a writ of attachment by filing an application for the order and writ with the court in which
22 the action is brought.

23 (CAL. CIV. PROC. §484.010; *Lorber Industries of Calif. v. Turbulence, Inc.*
24 (1985) 175 Cal.App.3d 532, 535.) Therefore, Travelers may apply for a writ of

1 attachment against Jokake in this action.

2 **IV. TRAVELERS IS ENTITLED TO OBTAIN THE RIGHT TO ATTACH**
3 **ORDER AND A WRIT OF ATTACHMENT AGAINST JOKAKE**

4 The moving party must also establish the normal requirements for issuance
5 of a right to attach order and writ of attachment. *See CAL.CIV.PROC. §485.210(b);*
6 *Western Steel & Ship Repair v. RMI, Inc.*, (1986) 176 Cal.App.3d 1108, 1113. Code
7 of Civil Procedure Section 484.090 provides that a court shall issue a right to attach
8 order upon showing of the following: (1) the claim upon which the attachment is
9 based is one upon which an attachment may be issued; (2) the plaintiff has
10 established the probable validity of the claim upon which the attachment is based;
11 (3) the attachment is not sought for a purpose other than the recovery on the claim
12 upon which the attachment is based; and (4) the amount to be secured by the
13 attachment is greater than zero. Code Civ. Proc. § 484.090. As will be shown
14 below, Travelers satisfies all the requirements for this Court to properly issue the
15 requested relief.

16 **A. The Claim Upon Which Travelers Seeks Attachment Is Based**
17 **Upon One For Which An Attachment May Be Issued**

18 Travelers seeks this attachment to secure recovery on a claim upon which
19 this Court may issue an attachment. Code Civ. Proc. § 483.010(a) generally defines
20 the claims upon which an attachment may issue as those that are for a fixed or
21 readily ascertainable amount of money not less than \$500.00 (exclusive of costs,
22 interest, and attorney's fees) and based upon an express or implied contract.
23 Further, the claim upon which an attachment may issue must be an unsecured
24 commercial claim. Code Civ. Proc. § 483.010(b), (c).

25 **1. Travelers' Claim Is A Claim For A Fixed Amount Of Money**
26 **Greater Than \$500 That Is Based On An Express Contract**

27 Travelers' claim is for a fixed and readily ascertainable amount of money
28 exceeding \$500.00 and based upon an express contract. Travelers' claim is

1 currently in excess of \$31,000,000.00, which is the total sum of Travelers'
2 estimated exposure to date. Notwithstanding, as mentioned above, Travelers is
3 currently seeking Right to Attach Order and Writ of Attachment for the total
4 amount of \$25,000,000.00. This claim is based on Jokake's contractual obligations
5 in the GAI, which is a clear and unambiguous written contract. Code Civ. Proc. §
6 483.010(a).

7 **2. Travelers' Claim Is An Unsecured Commercial Claim**

8 Travelers' claim is an unsecured commercial claim. Pursuant to CCP
9 §483.010 (b), “[a]n attachment may not be issued on a claim which is secured by
10 any interest in real property arising from agreement, statute, or other rule of law
11 (including any mortgage or deed of trust of realty and any statutory, common law,
12 or equitable lien on real property, but excluding any security interest in fixtures
13 subject to Division 9 (commencing with Section 9101) of the Commercial Code).”
14 (Code Civ. Proc. § 483.010(b)) Travelers' claim is not secured by an interest in real
15 property.

16 Here, Travelers' claim against Jokake is unsecured. Travelers is not seeking
17 to attach any secured assets duplicative of that already secured by any security
18 interest. (Brown Decl., ¶ 32) Furthermore, Travelers' claim is not secured by any
19 interest, whether lien or otherwise, in real property or deeds of trust. (Brown Decl.,
20 ¶ 33) Therefore, Travelers has met this requirement.

21 **B. Travelers Has Established The Probably Validity Of The Claim
Upon Which The Attachment Is Based**

22 By the evidence presented in support of this Application, Travelers has
23 established the probable validity of the claim against Jokake under the GAI.
24 Probable validity exists when “it is more likely than not that the plaintiff will obtain
25 a judgment against the Defendants on that claim.” Code Civ. Proc. § 481.190.
26

1 **1. It Is More Likely That Not That Travelers Will Obtain A**
2 **Judgment Against Jokake On Its Claim**

3 Under California law, a written indemnity agreement is fully enforceable and
4 should be “construed like any other contract with a view to determining the actual
5 intention of the parties; no artificial rules apply.” *Fidelity and Deposit Co. v.*
6 *Whitson* (1960) 187 Cal.App.2d 751, 756; *Amwest Surety Ins. Co. v. Patriot*
7 *Homes, Inc.* (2005) 135 Cal.App.4th 82. Indemnity agreements are routinely
8 enforced in favor of the surety. *Fidelity and Deposit Co., supra*, (1960) 187
9 Cal.App.2d 751, 756; *General Ins. Co. of America v. Howard Hampton, Inc.* (1960)
10 185 Cal.App.2d 426.

11 Thus, “[t]here can be no question but that a surety is entitled to stand upon
12 the letter of his contract, and his undertaking is to be construed strictly in his favor.”
13 *Com'l Ins. Co. of Newark v. Pacific-Peru Constr. Corp.*, (9th Cir. 1977) 558 F.2d
14 948, 953; *Fidelity and Deposit Co., supra*, 187 Cal. App. 2d at 756; *Amwest Surety*
15 *Ins. Co., supra*, 135 Cal. App. 4th at 87; *Safeco Ins. Co. of America v. Schwab*, (9th
16 Cir. 1984) 739 F.2d 431, 433. California and federal law provide for strict
17 enforcement of surety indemnity agreements as a necessary element of the surety-
18 indemnitor relationship, and the surety industry altogether. *General Insur. Co. v.*
19 *Singleton*, (1974) 40 Cal. App. 3d 439, 443.

20 *Safeco Ins. Co. of America v. Schwab*, (9th Cir. 1984) 739 F.2d 431, is
21 directly on point. In *Schwab*, the surety sought specific enforcement of the
22 collateral security provision contained in an indemnity agreement prior to surety’s
23 payment of any claim on the subject bond. The Ninth Circuit held that the surety
24 was entitled to the collateral requested pursuant to the terms of the indemnity
25 agreement as soon as a demand has been made on the bond and before the surety is
26 even called to experience a loss. The Court explained: “If a creditor is to have the
27 security position for which he bargained, the promise to maintain the security must
28 be specifically enforced.” *Id.* at 433.

1 Here, Travelers filed the instant action against Jokake to enforce the
2 contractual obligations under the GAI. The GAI was voluntarily entered into by the
3 Jokake as consideration for Travelers' issuance of bonds, including the Bonds in
4 connection with the Project. The GAI unambiguously required Jokake to provide
5 collateral and indemnify Travelers upon demand for Travelers' losses and potential
6 losses incurred in connection with the Bonds. In fact, the GAI explicitly states that
7 Jokake must deposit "an amount as determined by [Travelers]". Here, prior
8 demands have been made by Travelers and the losses continue to increase.
9 Travelers has determined to date that its potential losses will total in excess of
10 \$31,000,000.00.

11 Despite voluntarily undertaking these obligations contained in the GAI, and
12 Travelers' demand therefor, Jokake has failed to post sufficient collateral. Such
13 failure is a breach of the express terms of the GAI.

14 Because Jokake has failed to abide by the express terms of the GAI, it is
15 more likely than not that Travelers will prevail on its claims against Jokake.
16 Furthermore, Jokake has no viable defense to its indemnity obligations to Travelers.
17 As such, Travelers has established the probable validity of its claim .

18 **2. Travelers' Claim Is One On Which Attachment Is Proper**

19 The relief sought herein by Travelers is supported by established California
20 and federal law, which holds that an attachment is properly issued in an action
21 brought by a surety against its indemnitors for reimbursement under an indemnity
22 agreement. *General Insurance Co. of America v. Howard Hampton, supra*, 185 Cal.
23 App. 2d 426 ("Howard Hampton") (upholding the issuance of an attachment order
24 as to the surety's cause of action for collateral, finding that the indemnity
25 agreement was "a contract for the direct payment of money"). "A California
26 appellate court has authorized prejudgment attachments in suits for specific
27 performance of collateral security provisions." *Safeco Ins. Co. of America, supra*,
28 (9th Cir. 1984) 739 F.2d 431, 433.

1 In *Howard Hampton, supra*, 185 Cal. App. 2d 426, the California Court of
2 Appeal upheld an order of attachment in favor of the surety plaintiff and against the
3 indemnitors. In *Howard Hampton*, the surety issued bonds on behalf of a building
4 contractor in consideration for the execution of indemnity agreements. The
5 contractor allegedly defaulted on the underlying contract, causing the project owner
6 to assert a claim against the performance bond. *Id.* at 428. The surety filed a lawsuit
7 against its indemnitors seeking indemnity and collateral as well as its attorneys'
8 fees under the relevant indemnity agreements. The court issued an attachment order
9 against the indemnitors in favor of the surety to enforce the collateral obligation in
10 the indemnity agreements finding that the surety's claim for collateral under the
11 indemnity agreements was a "contract for the direct payment of money." *Id.*

12 As further set forth in *Howard Hampton*, prior judicial determination of the
13 surety's duty to incur a loss is *not* required for attachment or to specifically enforce
14 the collateral security provisions of an indemnity agreement. *Id.* Indeed, courts in
15 California have long held that a surety is not required to bring suit or obtain a
16 judgment to establish the liability of the principal for a surety to recover under an
17 indemnity agreement. *See Whitson, supra*, 187 Cal. App. 2d at 757.

18 Here, like the surety in *Howard Hampton*, Travelers has filed the instant
19 lawsuit against Jokake, seeking indemnity and collateral as well as its attorneys'
20 fees under the GAI. (Brown Decl., ¶ 28) The GAI unambiguously imposes the duty
21 on Jokake to provide cash and/or collateral upon demand by Travelers. Travelers
22 currently has exposure via numerous claims on the Bonds by the Owner and Project
23 subcontractors yet Jokake has failed to provide collateral or fully indemnify
24 Travelers in breach of the GAI. (Brown Decl., ¶ 20) Accordingly, an attachment
25 order against Jokake in favor of Travelers is proper to enforce the collateral
26 obligations in the GAI.

27
28

1 3. Attachment Is Proper Under The Doctrine of *Quia Timet*

2 In addition to the cases discussed above, authority for the pre-judgment
3 remedy of attachment can be found in the case law supporting the doctrine of *quia
4 timet* (“because he fears”). *Quia timet* is an action for equitable relief against an
5 anticipated injury which plaintiff legitimately fears and which cannot be avoided by
6 the present action of law. *Escrow Agents’ Fidelity Corp. v. Superior Court*, (1992)
7 4 Cal. App. 4th 491, 494. *Quia timet* is applied to prevent wrongs or anticipated
8 mischief. *Id.* A party requests such aid from the court when it fears some future
9 probable injury to his rights or interests. *Id.*

10 In *Escrow Agents’*, the court remarked, the *quia timet* remedy is especially
11 suited to surety cases, explaining that:

12 Although a surety may file an action at law to compel its
13 principal to perform the obligation on a bond when due
14 (Civil Code Section 2846), the fact that it may eventually
15 obtain a judgment against the principal is of little comfort
16 to the surety if, in the interim, **the principal has
17 absconded with the very funds which could have been
18 used to satisfy the bond.** *Quia timet* allows the surety to
prevent the principal from dissipating those funds if the
surety knows it will be called upon “to pay the debt or
perform the obligation” on the bond, suspects that the
principal has some or all of the necessary funds to do so,
and **fears that the principal may abscond with those
funds.** *Id.* at 495 (emphasis added).

19 Although the court in *Escrow Agents’* was not called upon to issue a writ of
20 attachment pursuant to the doctrine of *quia timet*, the court stated in dicta that
21 attachment would be a possible statutory remedy for a surety under the same
22 rationale. (*Id.*) As in *Escrow Agents’*, here, Travelers, the surety, reasonably fears
23 that Jokake will abscond with considerable funds which could be used to satisfy
24 potential losses incurred by Travelers. (Brown Decl., ¶ 31) As recognized by the
25 doctrine of *quia timet*, this would result in irreparable injury to Travelers. *Escrow
Agents’*, 4 Cal. App. 4th at 494.

1 **C. The Attachment Is Not Sought For A Purpose Other Than The**
2 **Recovery On The Claim Upon Which The Attachment Is Based**

3 Travelers seeks attachment for no purpose other than the recovery on the
4 claim upon which the attachment is based. Code Civ. Proc. § 484.020(c); (Brown
5 Decl., ¶ 35)

6 Travelers seeks a writ of attachment of the identifiable, applicable assets of
7 Jokake to preserve the status quo so that no assets may be dissipated or transferred
8 and to ensure that there is adequate security and that funds will be available to
9 satisfy Travelers' inevitable judgment against Jokake. (Brown Decl., ¶ 36)

10 **D. Travelers' Claim Is For An Amount Greater Than Zero**

11 Travelers' claim is for a writ of attachment in an amount greater than zero
12 against Jokake's non-exempt property as listed in Attachment "A" to the
13 Application filed concurrently herewith. (Brown Decl., ¶ 29); *see* Code Civ. Proc. §
14 484.020(c). The total amount of loss Travelers anticipates to incur is in excess of
15 \$31,000,000.00 and the amount sought to be attached is \$25,000,000, both of which
16 are an amount greater than zero, the minimum amount a court must find for the
17 issuance of a right to attach order and writ of attachment pursuant to Section
18 484.090(a)(4) of the California Code of Civil Procedure.

19 **V. THE PROPERTY UPON WHICH TRAVELERS REQUESTS**
20 **ATTACHMENT IS PROPERLY ATTACHABLE**

21 Travelers seeks attachment of the following against Jokake:

22 (a) any and all accounts receivable, and general intangibles arising out of
23 their conduct of a trade, business or profession (Code Civ. Proc. § 488.080(a)(10));

24 (b) final money judgments arising out of their conduct of a trade, business
25 or profession (Code Civ. Proc. § 488.080(a)(11));

26 (c) a lien in any money judgment or settlement proceeds otherwise
27 payable to Jokake, in any pending court case, arbitration, mediation, hearing,
28 administrative proceeding, or other proceeding (Code Civ. Proc. § 491.410);

- (d) Jokake's' interests in real property (Code Civ. Proc. § 488.080(a)(1));
- (e) motor vehicles, vessels, mobile homes or commercial coaches used as equipment of business (Code Civ. Proc. § 488.080(a)(5));
- (f) money and deposit accounts (Code Civ. Proc. § 488.080(a)(8));
- (g) equipment of business (Code Civ. Proc. § 488.080(a)(4));
- (h) Jokake's rights, title, and interests in any monies due or to become due on any insurance policy;
- (i) any and all business interests of Jokake;
- (j) all corporate property of Jokake (Code Civ. Proc. § 487.010); and
- (k) any and all other assets not subject to California exemptions (including California Code of Civil Procedure Section 487.020) within Jokake's possession, custody or control.

Therefore, the property upon which Travelers requests attachment is properly attachable.

VI. CONCLUSION

For the foregoing reasons, Travelers respectfully requests that the Court issue a right to attach order and order for writ of attachment with respect to Jokake's non-exempt real and personal property, as well as all other assets, including, but not limited to those assets listed on Attachment "A" to the application in the amount of \$25,000,000.00.

Dated: September 28, 2023

Watt, Tieder, Hoffar & Fitzgerald, L.L.P.

By: /s/ *Rebecca S. Glos*

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